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NO. 1257, OCTOBER TERM, 1965

IN THE

Supreme Court of the United States

JOHN ALBERT COOK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM F. WALSH
1955 Richmond Ave.
Houston, Texas 77006
JAckson 9-3134

Counsel for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented: Whether a federal criminal conviction can stand when the trial court does not instruct the jury as to the elements of the offense charged, but instead reads to the jury a statute embracing nearly half a million different offenses?	2
Constitutional Provision Involved	2
Statement	2
Reasons For Granting The Writ	3
Conclusion	6
Certificate of Service	7
Appendix "A"	9
Appendix "B"	11
Appendix "C"	12

INDEX OF AUTHORITIES

CASES	Page
Bollenbach v. United States, 326 U.S. 607, 613	5
Byrd v. United States, 342 F.2d 939, 940 (D.C. 1965)	3
Campbell v. United States, 167 F.2d 451, 453	5
Christoffel v. United States, 338 U.S. 84, 90	5
Lott v. United States, 218 F.2d 675, 680-681 (Footnote 7)	6
Merrill v. United States, 338 F.2d 763, 767	6
Morris v. United States, 156 F.2d 525, 531	4

CASES	Page
Peterson v. United States, 344 F.2d 419, 428	6
Samuel v. United States, 169 F.2d 787, 792 (C.A. 9)	6
Screws v. United States, 325 U.S. 91, 107	3, 6
Terminiello v. Chicago, 337 U.S. 1, 5	6
United Brotherhood v. United States, 330 U.S. 395, 411-412	6
United States v. Harris, 346 F.2d 182, 184 (C.A. 4, 1965)	3
United States v. Hutchison, 338 F.2d 991 (C.A.4, 1964)	3
United States v. Massiah, 307 F.2d 62, 71 (C.A.2, 1962)	3
Williamson v. United States, 332 F.2d 123, 133-134 (1964)	5
Rule 52(b), Federal Rules of Criminal Procedure	4

NO._____, OCTOBER TERM, 1965

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JOHN ALBERT COOK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Albert Cook prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction of a three-count indictment (R. 3-5) accusing Petitioner of conscious and unlawful possession of a stolen Treasurer's check, in violation of Section 1708, Title 18, *United States Code* (Count One), forging a signature on the same check, in violation of Section 495, Title 18, *United States Code* (Count Two), and uttering the same check, in violation of Section 495, Title 18, *United States Code* (Count Three).

OPINION BELOW

The District Court for the Southern District of Texas did not render an opinion. The Opinion of the Court of Appeals is reported at 356 F.2d 918, and is reproduced as Appendix "A" to this Petition.

JURISDICTION

Judgment of the Court of Appeals (Appendix "B") was entered on February 18, 1966 (R. 283), and a timely petition for rehearing (R. 284) was denied (Appendix "C") on March 30, 1966 (R. 292). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether a federal criminal conviction can stand when the trial court does not instruct the jury as to the elements of the offense charged, but instead reads to the jury a statute embracing nearly half a million different offenses?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT

Viewing the evidence in the light most favorable to the prosecution, this was the government's case:

Richard A. Newsome heard his mailbox opened, went to the door, and found Cook on his front porch (R. 40). Petitioner came into Mrs. D. A. Conner's liquor store and cashed a government check payable to Richard A. New-

some. When she followed him from the store, Petitioner fled (R. 70-73). A government expert on questioned documents testified that Cook's handwriting corresponded to the signature on the questioned check (R. 138).

Petitioner took the stand to deny and contradict prosecution testimony and asserted his innocence (R. 159-173).

After some period of deliberation, the jurors asked the Court to explain whether Count One charged that Appellant stole the check in question "or that he only had it in his possession" (R. 256). The judge explained that "the count does not charge the defendant, as such, with having stolen the check", but "charges him with receiving, concealing and unlawfully having in his possession the check . . ." The judge's answer to the jury's question is printed in full at pages 256 and 258 and includes the statement that "I did not mean to infer that it is your duty to find one way or the other whether he knew that it had either been stolen, taken or abstracted" (R. 258).

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because the Opinion of the Court of Appeals (Appendix "A") not only conflicts with this Court's requirement that the instructions to the jury in a criminal case must identify "the essential ingredients of the only offense on which the conviction could rest" (*Screws v. United States*, 325 U.S. 91, 107), but also because the Fifth Circuit's Opinion is in direct conflict with the following Opinions from other Circuits:

United States v. Massiah, 307 F.2d 62, 71 (C.A.2, 1962).
United States v. Hutchison, 338 F.2d 991 (C.A.4, 1964).
United States v. Harris, 346 F.2d 182, 184 (C.A.4, 1965).
Byrd v. United States, 342 F.2d 939, 940 (D.C., 1965).

Indeed, the Fifth Circuit's opinion in this case flatly eliminates the requirement established by this Court and by other Courts of Appeals that the trial judge has an independent, mandatory duty to advise jurors of the ultimate facts which must be proved in a federal criminal case before a conviction may be countenanced.

It is true that the trial judge read to the jury the statutes creating the offenses for which this Petitioner was indicted (R. 247-248; 248-250; 250-251).

But in one statute (Section 1708, Title 18), at least 493,841 acts are made criminal offenses; the other statute (Section 495, Title 18) creates 600 independent crimes. (A catalog of these offenses was filed with the Fifth Circuit in a "Reply Brief for the Appellant." A certified copy of this Reply Brief has been filed in this Court with the certified record.)

It seems almost elementary to observe, as did the Ninth Circuit, that:

> "The verdict is not merely a report upon the facts; it is a legal decision that the facts laid before (the jury) do or do not fit the essential elements of a social proscription, the violation of which entails a penalty." *Morris v. U.S.*, 156 F.2d 525, 531.

The judge in this case, we contend, completely failed to advise the jury what factual decisions it was required to make—to an extent which constitutes plain error under Criminal Rule 52(b).

The Fifth Circuit itself has recognized that instructions almost exactly like those given here are completely inadequate, stating:

> "An examination of the charge as to Count 1 of the indictment shows that it constitutes chiefly a reading by the court to the jury of all of Section 301 and of Count 1. Not a word is said as to exactly what is charged in the count, nor of what proof is necessary under it. We think this amounts to there having been virtually no charge, and, therefore, there is reversible error. *Campbell v. U.S.*, 167 F.2d 451, 453."

A defendant has, of course, a "fundamental right" to "be convicted of crime only on proof of all the elements of the crime charged against him." (*Christoffel v. United States*, 338 U.S. 84, 90), and the Supreme Court has said:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the appropriate legal criteria." (*Bollenbach v. United States*, 326 U.S. 607, 613.)

If anything, the instructions in this case are calculated to confuse, rather than enlighten, the jury. Criticizing the practice of reading an entire statute creating offenses which are not even suggested by the indictment, the Fifth Circuit has said that " the jury should not be permitted to speculate on what crime is being submitted to them to resolve or what the contents of each such crime might be." (*Williamson v. United States*, 332 F.2d 123, 133-134 [1964].)

We do not contend that objections to the charge specifically pointed out these defects.

It has long been established, however, that, "In a criminal case the court must instruct on all essentials of law involved, whether or not it is requested to do so."

See *Samuel v. United States*, 169 F.2d 787, 792 (C.A.9), citing cases from the 2nd, 3rd, 9th, 10th, and District of Columbia Circuits. See also the Fifth Circuit's opinions in *Lott v. United States*, 218 F.2d 675, 680-681 (footnote 7), *Merrill v. United States*, 338 F.2d 763, 767, and *Peterson v. United States*, 344 F.2d 419, 428.

The Supreme Court has repeatedly emphasized that failure to except to a charge which does not correctly set forth the essential law of the case does not defeat an appeal. See *United Brotherhood v. United States*, 330 U.S. 395, 411-412; *Terminiello v. Chicago*, 337 U.S. 1, 5; and Rule 52 (b), Federal Rules of Criminal Procedure.

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." *Screws v. United States*, 325 U.S. 91, 107.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

WILLIAM F. WALSH
1955 Richmond Ave.
Houston, Texas 77006
JAckson 9-3134
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that five (5) copies of this petition were mailed to the Solicitor General, Department of Justice, Washington, D.C., airmail postage prepaid, and that a copy was mailed to the United States Attorney, Southern District of Texas, Houston, Texas, first class postage prepaid, this ____ day of April, 1966.

WILLIAM F. WALSH

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22,781

JOHN ALBERT COOK, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 18, 1966.)

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

PER CURIAM: This is an appeal from the conviction of appellant on all counts of a three count indictment as follows:

(a) unlawful possession of a stolen United States Treasurer's check in violation of 18 U.S.C. 1708 (Count One),

(b) forgery of a United States Treasurer's check in violation of 18 U.S.C. 495 (Count Two), and

(c) uttering a forged United States Treasurer's check in violation of 18 U.S.C. 495 (Count Three).

It is the contention of appellant that the Court committed reversible error in failing to charge on the elements of the offenses alleged in the counts of the indictment.

In the charge the trial court followed the reading of each count of the indictment by reading in full the statute pertaining to each offense, which statutes contained the elements of the offense charged.

While it is conceded that the charge might be more understandable if the Judge enumerates each of the elements of the offense that must be proven beyond a reasonable doubt, no fundamental error under Rule 52(b) F.R.Crim. P.[1] was committed in the trial court's failure to do so in this instance.

AFFIRMED.

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[1](b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22,781

D. C. Docket No. 65-H-71-Criminal Action

JOHN ALBERT COOK, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 18, 1966

Issued as Mandate:

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE FIFTH CIRCUIT

No. 22,781

JAMES ALBERT COOK, Appellant,
versus
UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(MARCH 30, 1966)
ON PETITION FOR REHEARING

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1257

JOHN ALBERT COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 281-282) is reported at 356 F. 2d 918.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1966 (R. 283). A petition for rehearing was denied on March 30, 1966 (R. 285-287, 292). The petition for a writ of certiorari was filed

on April 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the judge properly charged the jury on the elements of the offenses.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Texas, petitioner was convicted of unlawful possession of a stolen United States Treasurer's check knowing it to have been stolen, in violation of 18 U.S.C. 1708 (Count 1); forgery of the check in violation of 18 U.S.C. 495 (Count 2); and uttering the forged check in violation of 18 U.S.C. 495 (Count 3) (R. 3-5, 259-260, 274). Concurrent two-year sentences of imprisonment were imposed on each of the three counts (R. 275). The conviction was unanimously affirmed (R. 283).

1. The evidence showed that Mr. Newsome failed to receive his regular monthly railroad retirement check for February, 1964 (Gov. Ex. 1; R. 34). On February 2, 1964, Newsome heard his mailbox being opened. When he stepped on the porch, he saw petitioner reach behind his hip pocket while asking for a charitable contribution (R. 40-41). Shortly thereafter petitioner cashed the check at Mrs. Conner's liquor store (R. 70-71). Upon becoming suspicious that petitioner was too young for railroad retirement, Mrs. Conner followed him. Petitioner ran away when he became aware that he was being followed (R. 72-73). Mrs. Conner telephoned Newsome

about the check after looking up his number in the telephone book, and Newsome reported to the Postal Department that his mailbox had been robbed (R. 73-74, 46). A postal inspector recovered the check at the liquor store and was given a description of the suspect by Mrs. Conner and Newsome (R. 98-99, 74, 114), both of whom subsequently identified petitioner (R. 74-75, 109). Petitioner furnished specimens of his handwriting which, according to testimony of a handwriting expert, corresponded with the endorsement on the stolen check (R. 99-102, 137-138).

Petitioner testified and denied having been on Newsome's porch soliciting a contribution and having forged or cashed the check (R. 172, 162).

2. Prior to the final charge, petitioner's counsel told the court that he had no requests for special instructions and that he would be satisfied with a general charge (R. 233). In its charge, the court first defined the terms "unlawful," "wilfully," "knowingly," "forgery" and "intent to defraud," as used in the indictment (R. 243-245). After paraphrasing Count 1 of the indictment, the court briefly discussed the evidence and then read in full 18 U.S.C. 1708, upon which Count 1 was based (R. 245-248). The court similarly summarized Counts 2 and 3 and read verbatim the provisions of 18 U.S.C. 495 as applicable to those counts (R. 248-250). Finally, the court gave a charge on expert testimony (R. 252). Petitioner's counsel stated he had no objections to the charge as given (R. 254).

After some deliberation, the jury submitted a question as to whether Count 1 charged that petitioner

took the check from the mailbox or only that he had it in his possession (R. 256, 273). The court explained that the count charged petitioner with having possession of the check, knowing it to have been stolen. He told the jury that if they should find he did have possession, "then your next inquiry is whether he had knowledge it was stolen" (R. 256). He again briefly reviewed the evidence and indicated that the significant question was knowledge (R. 257).

ARGUMENT

The judge adequately presented the issues in this simple case to the jury. As to the forgery counts, the case turned on whether the jury believed the testimony of Mrs. Conner and the expert that petitioner was the one who signed Mr. Newsome's name and cashed the check, or whether it believed petitioner's testimony that he did not. The judge so informed the jury (R. 242, 245, 251). The judge also separately defined for the jury the various terms used in the indictment, including forgery and intent to defraud (R. 243-245). In these circumstances, the reading of the full language of 18 U.S.C. 495, as to which no objection was interposed, was not "plain error" under Rule 52(b), F.R.Crim.P. See *Kitchens* v. *United States*, 272 F. 2d 757, 761 (C.A. 10), certiorari denied, 362 U.S. 942; *Walker* v. *United States*, 342 F. 2d 22, 24-25 (C.A. 5), certiorari denied, 382 U.S. 859. It is pure speculation to suppose that the jury, despite the simple nature of the case, was confused by consideration of petitioner's possible guilt

of other offenses as to which there was neither evidence nor discussion in the charge.

With regard to Count 1, charging knowing possession of a stolen government check, whatever defects there may have been in the original charge were cured by the supplemental instruction which clearly set forth to the jury the contents of the indictment and the requisite elements of a verdict of guilt. Any confusion initially caused by the reading of the entire statute was thus entirely dispelled before the jury returned its verdict. Any one count will, moreover, support the sentence imposed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1966

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